

**FILED**  
IN CLERK'S OFFICE  
U.S. DISTRICT COURT E.D.N.Y.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

★ AUG 17 2012 ★

LONG ISLAND OFFICE

JASON J. GARCIA  
on behalf of himself and  
all other similarly situated consumers

Plaintiff,

-against-

J. MARK HELDENBRAND, PC

Defendant.

CV-12-4137  
SUMMONS ISSUED

ROSS, J.

GO, M.

**CLASS ACTION COMPLAINT**

*Introduction*

1. Plaintiff Jason Joseph Garcia seeks redress for the illegal practices of J. Mark Heldenbrand, PC in which it unlawfully engaged in the collection of consumer debts in violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, et seq. ("FDCPA").
2. Plaintiff is a citizen of the State of New York who resides within this District.
3. Plaintiff is a consumer as that term is defined by Section 15 U.S.C. § 1692(a)(3) of the FDCPA.
4. The alleged debt that Defendant sought to collect from the Plaintiff involves a consumer debt purportedly owed to DT Credit Corp.

5. Upon information and belief, Defendant's principal place of business is located within Phoenix, Arizona.
6. Defendant is regularly engaged, for profit, in the collection of debts allegedly owed by consumers.
7. Defendant is a "debt collector" as that term is defined by the FDCPA, 15 U.S.C. § 1692(a)(6).

***Jurisdiction and Venue***

8. This Court has federal question jurisdiction under 15 U.S.C. § 1692k(d) and 28 U.S.C. § 1331.
9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), as the acts and transactions that give rise to this action occurred, in substantial part, within this district.

***Allegations Particular to Jason J. Garcia***

10. Upon information and belief, on a date better known by Defendant, Defendant began to attempt to collect an alleged consumer debt from the Plaintiff.
11. On or about March 6, 2012 and April 10, 2012 Defendant sent collection letters communicating to the least sophisticated consumer that the communication came from a law firm in a practical sense violating Section 1692e(3).

Reade-Alvarez v. Eltman, Eltman & Cooper, P.C., 369 F. Supp. 2d 353, 2005 U.S. Dist. LEXIS 8472 (E.D.N.Y. 2005). (computer generated "mass mailing" of tax season settlement letter on a law firm letterhead lacking any disclaimer and without an attorney conducting any meaningful review states a claim for relief under Section 1692e(3).), Suquilanda v. Cohen & Slamowitz, LLP, 2011 U.S. Dist. LEXIS 102727 (S.D.N.Y.

Sept. 7, 2011) (Same), Cordes v. Frederick J. Hanna & Assocs., P.C., 789 F. Supp. 2d 1173, 2011 U.S. Dist. LEXIS 61222 (D. Minn. 2011) (same)

The FDCPA prohibits the use of any "false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. § 1692e. It enumerates a non-exhaustive list of sixteen debt-collection practices that run afoul of this proscription, including "the false representation or implication that [a] communication is from an attorney." Id. § 1692e(3).

The Second circuit has held that a debt-collection letter from a law firm or lawyer violates Section 1692e(3) if an attorney was not "directly and personally involved" with the debtor's account — such as by reviewing the debtor's file — before the letter was sent. Clomon v. Jackson, 988 F.2d 1314, 1320-21 (2d Cir. 1993), See, e.g., Taylor v. Perrin, Landry, deLaunay & Durand, 103 F.3d 1232, 1237-38 (5th Cir. 1997), Avila v. Rubin, 84 F.3d 222, 229 (7th Cir. 1996), Martsolf v. JBC Legal Grp., P.C., No. 1:04-CV-1346, 2008 WL 275719, at \*7 (M.D. Pa. Jan. 30, 2008), Sonmore v. Checkrite Recovery Servs., Inc., 187 F. Supp. 2d 1128, 1133 (D. Minn. 2001) (Alsop, J.), See also Suquilanda v. Cohen & Slamowitz LLP, No. 1:10-cv-05868 (S.D.N.Y. SEP 08, 2011).

("Absent any disclaimer and without an attorney conducting any meaningful review, using a "Law Office" Letterhead States a Claim for Relief under Section 1692e(3)."

The Second Circuit confronted similar facts in Clomon. There, the attorney Defendant approved the form of dunning letters sent by a collection agency and also "approved the procedures according to which th[e] letters were sent." 988 F.2d at 1317. He did not have any specific involvement with each debtor's account, however, such as reviewing the

debtor's file or the particular letter being mailed. *Id.* The Second Circuit concluded that the challenged letters, despite bearing the Defendant attorney's signature, violated Section 15 U.S.C. 1692e(3) because, although literally "from" an attorney, they "were not 'from' [him] in any meaningful sense of that word." *Id.* at 1320; accord, e.g., *Avila*, 84 F.3d at 229. The same result is obtained here.

12. Although J. Mark Heldenbrand, PC may technically be a law firm, it was not acting in the capacity of a law firm with respect to the said letters. The inclusion of "Attorney at Law" is therefore materially deceptive and misleading in that it communicates to the least sophisticated consumer that the communication came from a law firm in a practical sense, when it did not.
13. If J. Mark Heldenbrand, PC desires to take advantage of the additional collection leverage provided by the use of a law firm's name in connection with purely debt-collection related activities, it is free to do so under the law of the Second Circuit so long as its each and every one of its standardized communications including letters and voice mail messages do not give the least sophisticated consumer the impression that the communications are from an attorney or law firm in the practical sense.  
  
See e.g. Clomon v Jackson, 988 F.2d 1314, 1320 (2d Cir. 1993), See e.g. Gonzalez v. Kay, 577 F.3d 600 (5<sup>th</sup> Cir. 2009). ("Debt collectors acting solely as debt collectors must not send the message that a lawyer is involved, because this deceptively sends the message that the 'price of poker has gone up.'"), See also Sparkman v. Zwicker & Assocs., P.C., 374 F. Supp. 2d 293 (E.D.N.Y.2005). (The court found that the collector's letter with text on the front and back regarding attorney involvement was confusing to

the least sophisticated consumer and violated § 1692e.), Suquilanda v. Cohen & Slamowitz, LLP No. 1:10-cv-05868 (S.D.N.Y. SEP 08, 2011). ("Absent any disclaimer and without an attorney conducting any meaningful review, Using a "Law Office" Letterhead States a Claim for Relief under Section 1692e(3)".)

14. The Defendant printed and mailed, or caused to be printed and mailed, a letter to Plaintiff in an effort to collect from Plaintiff an obligation, or alleged obligation, owed or due, or asserted to be owed or due an original creditor other than. A true and correct copy of Defendant's communications are attached hereto.
15. Defendant, as a matter of pattern and practice, mail letters, or cause the mailing of letters, to debtors using language substantially similar or materially identical to that utilized by Defendant in mailing the above-cited letter to Plaintiff.
16. Defendant mails, or causes the mailing of, thousands of collection letters like the ones sent Plaintiff without conducting any meaningful review of the accounts.
17. The letters the Defendant mails, or causes to be mailed, are produced by Defendant's concerted efforts and integrated or shared technologies including computer programs, mailing houses, and electronic databases.
18. The said letters are standardized form letters.
19. Defendant violated 15 U.S.C. §§ 1692e, 1692e(3), 1692e(10) for indicating that the communication came from a law firm in a practical sense and for failing to qualify that the debt had not been reviewed by an attorney.

20. In the March 6, 2012 initial collection letter, the Defendant stated in pertinent part as follows: "The law does not require us to wait until the end of the thirty (30) day period before taking action to collect this debt."
21. Said language contradicts the Plaintiff's right to dispute the debt for the entire initial thirty day period.

Section 1692g(b) of the FDCPA states, "[a]ny collection activities and communication during the 30-day period may not overshadow or be inconsistent with the disclosure of the consumer's right to dispute the debt or request the name and address of the original creditor." 15 U.S.C. § 1692g(b). "Importantly, the FDCPA does not assume that the recipient of a collection letter is aware of h[is] right to require verification of the debt. Instead, the statute requires the debt collector to inform the debtor of his rights by sending him a 'validation notice' with the initial dunning letter (or within 5 days thereafter)." Owens v. Hellmuth & Johnson, PLLC, 550 F. Supp. 2d 1060,1064(D. Minn. 2008). (One of the reasons for requiring notice is to "ensure that debt collectors [give] consumers adequate information concerning their legal rights."), Swanson v. Southern Oregon Credit Serv., 869 F.2d 1222, 1225 (9th Cir.1988), quoting S. Rep. No. 382, 95th Cong. 2d Sess. 4, reprinted in 1977 U.S. Code Cong. & Admin. 17 News 1695, 1702). (However, if the consumer fails to contact the debt collector within 30 days these rights are lost forever. *Id.* It is therefore in the interest of an unscrupulous debt collector to not actually alert the consumer to his or her rights. Overshadowing occurs not only when the validation notice contains contradictory language, but also when the overall tenor, form, and context of the communication would mislead the least

sophisticated debtor and encourages him to disregard his rights.), Terran v. Kaplan, 109 F.3d 1428, 1432 (9th Cir.1997); see also Voris v. Resurgent Capital Services, L.P., 494 F. Supp. 2d 1156, 1163 (S.D.Cal. 2007). See also Russell v. Equifax A.R.S., 74 F.3d 30 (2d Cir. 1996). (A notice is overshadowing or contradictory if least sophisticated consumer would be confused as to the consumer's rights. Thus, it makes sense that under the FDCPA, notice of the thirty-day validation period is mandatory, but is not, under every circumstance, sufficient to satisfy § 1692g(a); a debt collector must "effectively convey" the notice to the debtor.), Smith v. Computer Credit, Inc., 167 F. 3d 1052, 1054 (6th Cir. 1999). (To determine whether a debt collector has "effectively conveyed" the validation notice, the United States Court of Appeals for the Third Circuit applies the "least sophisticated debtor" standard. The FDCPA is to be interpreted in accordance with the "least sophisticated debtor" standard.), See Clark Brown v. Card Serv. Ctr., 464 F.3d 450, 453 (3d Cir.2006). (The least sophisticated debtor standard is "lower than simply examining whether particular language would deceive or mislead a reasonable debtor."), Smith, 167 F.3d at 1054, quoting Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1227 (9th Cir. 1988)).

22. A demand for payment or action by the consumer within a time less than the disclosed thirty-day validation period contradicts § 1692g(a) and thus violates the FDCPA. See U.S. v. National Financial Services, 98 F.3d 131, 139 (4th Cir.1996), Russell v. Equifax A.R.S., 74 F.3d 30, 34 (2nd Cir.1996), Miller v. Payco-General Am. Credits, Inc., 943 F.2d 482, 484 (4th Cir.1991), Swanson v. Southern Oregon Credit Service, Inc., 869 F.2d 1222, 1226 (9th Cir. 1988).

23. Said letter is also a threat to take unintended legal action within the thirty day period.
24. Upon information and belief, Defendant had no intention to take any sort of action even after the thirty day period, as the Defendant send a SETTLEMENT OFFER to the Plaintiff on or about April 10, 2012.
25. In addition, the Defendant's said March 6, 2012 letter imposed upon the Plaintiff a false sense of urgency and false sense of great importance concerning the matter, where the Plaintiff was made to feel obligated to retain an attorney.
26. Defendant's letter is in violation of 15 U.S.C. §§ 1692g, 1692e(5), 1692e(10), and 1692e(11) for failing to accurately set forth the dispute and verification rights, for threatening to take action against Plaintiff even though Defendant has not and does not intend to take such action, for making "false statements which constituted false or misleading representations creating a false sense of urgency," and for engaging in deceptive and falsely threatening practices.

**AS AND FOR A FIRST CAUSE OF ACTION**

***Violations of the Fair Debt Collection Practices Act brought by Plaintiff on behalf of himself and the members of a class, as against the Defendant.***

27. Plaintiff re-states, re-alleges, and incorporates herein by reference, paragraphs one (1) through twenty six (26) as if set forth fully in this cause of action.
28. This cause of action is brought on behalf of Plaintiff and the members of a class.
29. The class consists of all persons whom Defendant's records reflect resided in the State of New York and who were sent collection letters bearing the Defendant's letterhead in substantially the same form as the letters sent to the Plaintiff, sent within one year prior



to the date of the within complaint concerning DT Credit Corp. (a) the collection letters were sent to a consumer seeking payment of a consumer debt; and (b) the collection letters were not returned by the postal service as undelivered (c) and the Plaintiff asserts that the letters contained violations of 15 U.S.C. §§ 1692g, 1692e(5), 1692e(10), and 1692e(11).

30. Pursuant to Federal Rule of Civil Procedure 23, a class action is appropriate and preferable in this case because:
- (a) Based on the fact that form collection letters are at the heart of this litigation, the class is so numerous that joinder of all members is impracticable.
  - (b) There are questions of law and fact common to the class and these questions predominate over any question(s) affecting only individual class members. The principal question presented by this claim is whether the Defendant violated the FDCPA.
  - (c) The only individual issue involves the identification of the consumers who received such collection letters, (*i.e.* the class members). This is purely a matter capable of ministerial determination from the records of the Defendant.
  - (d) The claims of the Plaintiff are typical of those of the class members. All of the respective class claims are based on substantially similar facts and legal theories.
  - (e) The Plaintiff will fairly and adequately represent the class members' interests. The Plaintiff has retained counsel experienced in bringing class actions and collection abuse claims. The Plaintiff's interests are

consistent with those of the members of the class.

31. A class action is superior for the fair and efficient adjudication of the class members' claims. Congress specifically envisions class actions as a principal means of enforcing the FDCPA. 15 U.S.C. § 1692(k). The members of the class are generally unsophisticated individuals, whose rights will not be vindicated in the absence of a class action. Prosecution of separate actions by individual members of the classes would create the risk of inconsistent or varying adjudications resulting in the establishment of inconsistent or varying standards for the parties and would not be in the interest of judicial economy.
32. If the facts are discovered to be appropriate, the Plaintiff will seek to certify a class pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.
33. Collection attempts, such as those made by the Defendant are to be evaluated by the objective standard of the hypothetical "least sophisticated consumer."

***Violations of the Fair Debt Collection Practices Act***

34. The Defendant's actions as set forth above in the within complaint violates the Fair Debt Collection Practices Act.
35. Because the Defendant violated of the Fair Debt Collection Practices Act, the Plaintiff and the members of the class are entitled to damages in accordance with the Fair Debt Collection Practices Act.

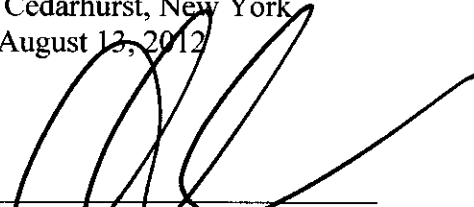
WHEREFORE, Plaintiff, respectfully requests that this Court enter judgment in Plaintiff's favor and against the Defendant and award damages as follows:

- (a) Statutory and actual damages provided under the FDCPA, 15 U.S.C. § 1692(k);

And

- (b) Attorney fees, litigation expenses and costs incurred in bringing this action; and
- (c) Any other relief that this Court deems appropriate and just under the circumstances.

Dated: Cedarhurst, New York  
August 13, 2012



Adam J. Fishbein, P.C. (AF-9508)  
Attorney At Law

**Attorney for the Plaintiff**

483 Chestnut Street  
Cedarhurst, New York 11516  
Telephone (516) 791-4400  
Facsimile (516) 791-4411

Plaintiff requests trial by jury on all issues so triable.



Adam J. Fishbein (AF-9508)



J. MARK HELDENBRAND, PC  
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P.O. Box 34772  
Phoenix, AZ 85067-4772  
Toll Free: 877.264.8498  
Bus: 602.254.3400  
Fax: 602.257.1064

March 6, 2012

JASON JOSEPH GARCIA  
110 GREENSTREET AVE APTA203  
BROOKLYN, NY 11222

Re:

Creditor ..... DT Credit Corp.  
Creditor Account# ..... 105010506701  
Account# ..... 578873  
Client Account# ..... 105010506701  
Balance ..... \$6,142.66

Dear JASON,

Please be advised that this law firm represents the above named creditor in its effort to collect your delinquent debt as shown above. Please contact our office to make arrangements to pay the unpaid balance. Please be sure to reference the account number listed above in any written correspondence.

Unless you notify this office within thirty (30) days after receiving this notice that you dispute the validity of the debt or any portion thereof, this office will assume this debt is valid. If you notify this office in writing within thirty (30) days from receiving this notice that you dispute the validity of this debt or any portion thereof, this office will obtain verification of the debt or obtain a copy of a judgment and mail you a copy of such verification or judgment. If you request such in writing within thirty (30) days after receiving this notice, this office will provide you with the name and address of the original creditor, if different from the current creditor. The law does not require us to wait until the end of the thirty (30) day period before taking action to collect this debt. This is an attempt to collect a debt. Any information obtained will be used for that purpose.

Sincerely,

Alex Mitchell  
Legal Administrator Ext - 105  
J. Mark Heldenbrand, PC



**J. MARK HELDENBRAND, PC**  
Attorney at Law  
P.O. Box 34772  
Phoenix, AZ 85067-4772  
Toll Free: 877.264.8498  
Bus: 602.254.3400  
Fax: 602.257.1064

April 10, 2012

JASON JOSEPH GARCIA  
110 GREENSTREET AVE APTA203  
BROOKLYN, NY  
11222

CREDITOR .....: DT Credit Corp.  
ACCOUNT# .....: 578873  
CLIENT ACCOUNT# ..: 105010506701

**BALANCE .....: \$6,142.66**

#### **SETTLEMENT OFFER**

Dear JASON :

This letter is to inform you that our client has agreed to accept \$1,571.33 for the above referenced balance as **SETTLEMENT IN FULL**. Payment for this settlement must be received in this office on or before 05/01/2012. Upon receiving this payment in accordance with this letter, we will notify our client that this account has been resolved. If payment is not received in accordance with the terms of this letter, we will continue our efforts to collect the balance in full.

Payment plans may be available for the settlement amount offered above. Call for details.

Please make checks payable to: J. Mark Heldenbrand, PC

Sincerely,

Don Kunkel  
Legal Administrator Ext 104

**This is an attempt to collect a debt and any information obtained will be used for that purpose.  
This is a communication from a debt collector.**